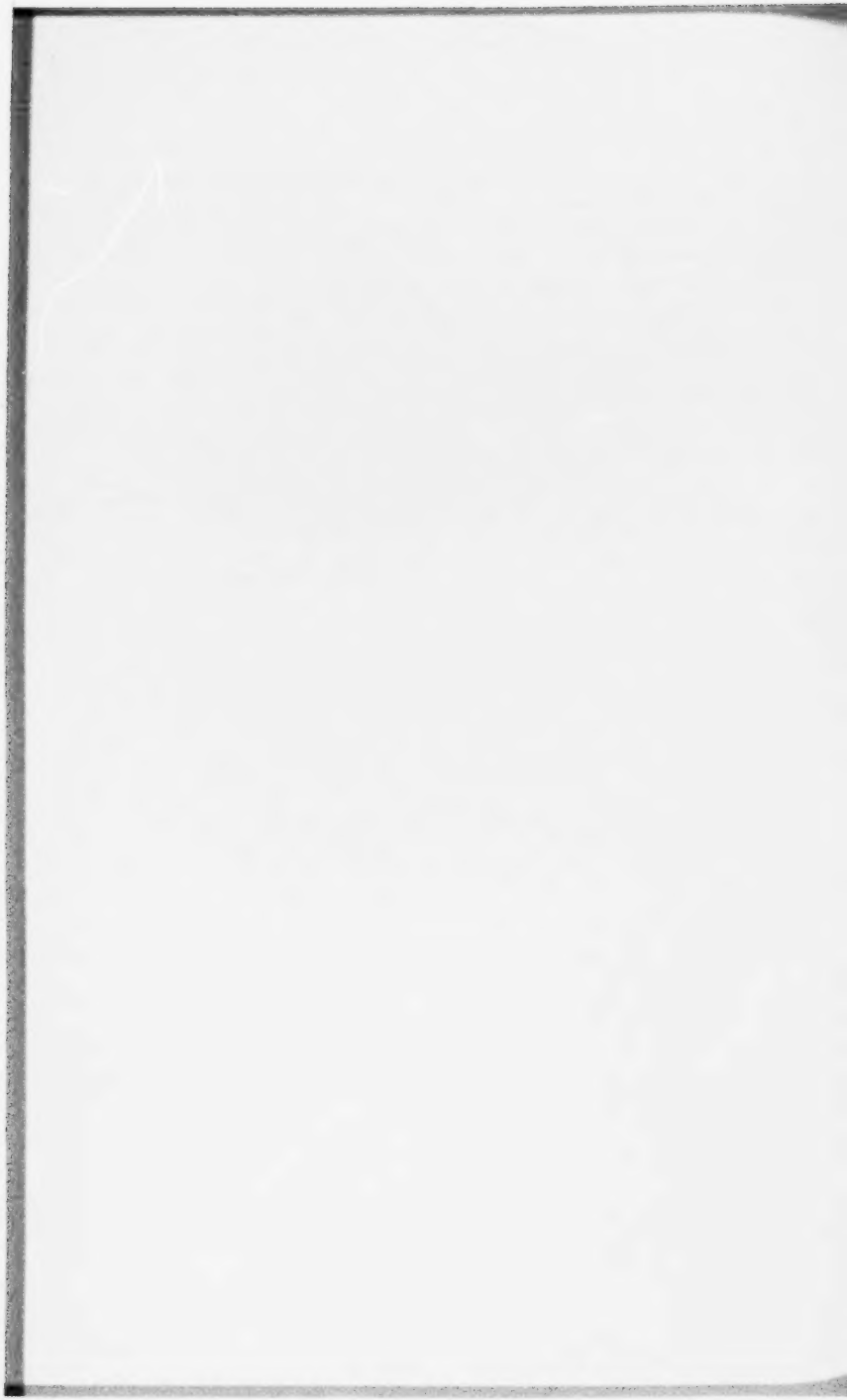

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 461

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of Richard T. Wilson, Jr., Deceased
Petitioners (on Cross-Petition)

against

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York
Respondent (on Cross-Petition)

Cross-Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

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GEORGE E. CLEARY
CLARK T. BROWN
Attorneys for Petitioners on Cross-Petition

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MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., deceased,

Petitioners (on Cross-Petition),

against

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,

Respondent (on Cross-Petition).

Cross-Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof.

Petition.

The Solicitor General of the United States, on behalf of the Collector of Internal Revenue, has filed a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of that Court entered July 18, 1932. The petitioners on

this cross-petition pray that, if a writ of certiorari be granted on the petition of the Solicitor General, a writ of certiorari likewise be granted on this cross-petition in order that the entire case may be reviewed by this Court. If a writ of certiorari is denied on the petition of the Solicitor General, these petitioners do not pray that a writ of certiorari be granted on this cross-petition.

Summary Statement of the Matter Involved.

This Federal income tax case involves the right of Richard T. Wilson, Jr., now deceased (referred to herein as the "taxpayer"), to deduct from his 1922 income a loss of $22,660. The amount of $22,660 was one-fifth of the loss on the sale in 1922 of certain real estate in which the taxpayer and his four brothers and sisters had inherited equal interests under the will of their father, Richard T. Wilson, Sr., who died in 1910, a resident of New York.

We contend, first, that under this will the real estate in question, which was part of the residuary estate, was devised directly to the five children of the testator and that the loss on the sale of the real estate was therefore sustained by the children and was deductible by them. The Collector contends that the will created a trust with respect to the residuary estate, with the executors as trustees, and that the loss on the sale of the real estate was deductible only by the executors as trustees and not by the beneficiaries.

We contend, second, that even if a trust was created, the beneficiaries were entitled to deduct the loss on the sale of the real estate in such trust because of their direct, entire and exclusive ownership of every present and future interest in the trust property.

The will did not by express terms create any trust with respect to the residuary estate. The will did create several

express trusts, all of which had been established prior to 1913, some nine years before the taxable year 1922. The residuary estate was disposed of by Article Fourth of the will, which provided as follows:

> "All the rest, residue and remainder of my property, * * * I direct my Executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:
>
> "(1) To my son Marshall Orme Wilson, one of such parts to be his absolutely.
>
> "(2) To my daughter Mary R. Goelet, one of such parts to be hers absolutely.
>
> "(3) One of such parts to the amount of Five hundred thousand dollars I direct to be added to the trust fund of Five hundred thousand dollars created in and by the foregoing Third Article of this will for the benefit of my son Richard T. Wilson, Jr. * * * *and the balance of such part I give and bequeath to my said son Richard T. Wilson, Jr. to be his absolutely.*" (Italics supplied.) (R. 36-37.)

Sub-paragraphs (4) and (5) of Article Fourth made provisions for two other children identical with those of sub-paragraph (3) for the taxpayer.

The real estate sold in 1922 was not used in the cases of three of the children, to increase the express trusts created by Article Third. It was part of the balance of the residuary estate which passed to the five children to be theirs absolutely. No one else had any interest in this property or the income from it or the proceeds of its sale.

The will directed the executors to sell the remaining residuary estate and to distribute the proceeds unless such distribution was deemed detrimental to the interests of the

testator's children, or, in their discretion to retain the proceeds for further conversion, not, however, beyond the period of the lives of two of the sons. The will also directed the executors to hold and manage the residuary estate until in their judgment it could be advantageously disposed of, but not longer than the two specified lives. The will directed the executors to distribute the income from the property in the residuary estate to the children semi-annually (R. 39-41).

The District Court for the Southern District of New York decided, contrary to our contentions, that under the will of Richard T. Wilson, Sr., a trust of the residuary property must be implied because of the above provisions as to management and discretionary retention of proceeds of sale by the executors, but sustained our contention that any trust so created was a trust with respect to which the beneficiaries had such a complete and direct ownership of the corpus that they were entitled to deduct from their income the loss on the sale of the trust real estate (R. 99-99).

The Circuit Court of Appeals for the Second Circuit also decided that the will created a trust. The Circuit Court of Appeals, however, decided that the taxpayer was entitled to deduct only a part of his share of the loss on the sale of the real estate in the residuary estate, the amount of the deductible loss to be determined by the proportion which the amount of the proceeds of the sale distributed to the children in 1922 bore to the entire proceeds of the sale. The Circuit Court of Appeals noted that if the property had been sold at a profit the portion of the profit distributed to the children would have been taxable to them individually and the portion of the profit retained by the executors would have been taxable to the executors. The Court held it followed that the loss should be deductible by the children individually in proportion to the amount of the proceeds of the sale distributed to them in 1922.

The Circuit Court of Appeals reversed the judgment and remanded the case to the District Court for a new trial to determine the amount of the loss deductible from the taxpayer's income. No new trial has been had and the amount of the loss to be deducted under the decision of the Circuit Court of Appeals has not been determined.

Questions Presented.

1. Did the will of Richard T. Wilson, Sr., create a trust with respect to his residuary estate remaining after establishing the trusts expressly provided for?

(If it is decided that the will did not create a trust with respect to such property, it becomes unnecessary to decide the remaining questions as it must then be conceded by the Collector that the real estate descended immediately to the heirs, *Brewster* v. *Gage*, 280 U. S. 327, and the loss on the sale of the property was their loss and deductible by them.)

2. If the will of Richard T. Wilson, Sr., did create a trust with respect to his remaining residuary estate, was it a trust in which the beneficiaries, by reason of their direct, entire and exclusive ownership of the corpus, were entitled to deduct from their income a loss on the sale of part of the corpus?

3. If the will of Richard T. Wilson, Sr., did create a trust with respect to the remaining residuary estate, is the deduction by the beneficiaries of the loss on the sale of the trust real estate to be limited by the proportion which the amount of the proceeds of the sale distributed to the beneficiaries in 1922 bore to the entire proceeds of the sale?

Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in holding that the will of Richard T. Wilson, Sr., created a trust with respect to his remaining residuary estate.

2. The Circuit Court of Appeals erred in not holding that, even though a trust was created with respect to the remaining residuary estate, the taxpayer was entitled to deduct from his income his full share of the loss on the sale of the Commercial Building.

3. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

Reasons for Granting the Writ.

As stated above, these petitioners pray that a writ of certiorari be granted on this cross-petition only in the event that the writ of certiorari is granted on the petition of the Solicitor General.

The petitioners do not believe that the case is of sufficient general importance to be heard by the Supreme Court. It involves at the outset the construction of a particular will. There is no conflict of decisions in the Circuit Courts of Appeals. The case does not fall within the other usual reasons for granting a writ of certiorari.

However, if a writ of certiorari is to be granted, the entire case should be presented to the Court. The petition of the Solicitor General on behalf of the Collector will present to the Court only the contention that the Circuit Court of Appeals erred in holding that the taxpayer was entitled to deduct a portion of the loss determined by the proportion which the amount of the proceeds of the sale distributed to the beneficiaries in the taxable year bore to the entire proceeds of the sale.

If the case is to be heard by this Court there should be presented the primary question of whether or not any trust of the remaining residuary estate was created by the will of Richard T. Wilson, Sr., because if no such trust was created the questions raised by the petition of the Solicitor General do not arise. Likewise, the case should be presented to the Court in such a manner that the Court may determine whether the taxpayer was entitled to a partial deduction, as determined by the Circuit Court of Appeals, or whether he was entitled to the entire deduction, as determined by the District Court.

WHEREFORE, it is respectfully submitted that, if a writ of certiorari is granted on the petition of the Solicitor General, a writ of certiorari likewise be granted on this cross-petition.

Respectfully submitted,

MARIAN STEEDMAN WILSON,
ROBERT GOELET and
HARLEM G. RUBERT,
As Executors of the Estate of
Richard T. Wilson, Jr., deceased,
Petitioners (on Cross-Petition).

GEORGE E. CLEARY,
CLARK T. BROWN,
Attorneys for Petitioners (on Cross-Petition).

BRIEF IN SUPPORT OF CROSS-PETITION.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 90-99) is reported in 51 F. (2d) 268. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 60 F. (2d) 52.

Jurisdiction.

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented and Statement of the Case.

The statement of the questions presented and the statement of the case will be found in the petition.

Argument.

As stated in the cross-petition, we do not believe this case is one in which a writ of certiorari should be granted. However, if a writ is to be granted on the petition of the Solicitor General, it should also be granted on the cross-petition in order to present the entire case to the Court, and bring up for consideration the following contentions of the petitioners on the cross-petition.

We maintain that the will of Richard T. Wilson, Sr., did not create a trust with respect to the remaining residuary estate, and that the Circuit Court of Appeals erred in holding that such a trust was created. The plan of the will was to create trusts for each of the five children, of $500,000 each, with the Union Trust Company of New York as Trustee, to increase three of these trusts to $1,000,000 each, and

to give the remaining residuary estate (with which we are here concerned) to the five children absolutely (R. 36-37).

The significant features of this will indicating that no trust of the residuary real estate was created are, *first*, the balance of the residuary estate is left absolutely and exclusively to the five children; *second*, there is no devise of the residuary real estate to the executors in trust or to anyone other than the five children; *third*, no intention is indicated to create a trust or to withhold the enjoyment of the balance of the residuary estate from the children except for the purpose of awaiting an advantageous market; *fourth*, such trusts as the testator intended should be set up are expressly provided for, with the Union Trust Company as Trustee with specific powers as to reinvestment of proceeds of sale; *fifth*, no express power to receive rents and profits is given the executors as required for a valid trust to sell by Section 97 of the Real Property Law of New York, nor is the distribution of rents and profits to each child limited to his life or a shorter period as required by Section 96.3 of such law; *sixth*, the full purpose of the testator could be accomplished by construing the will as vesting in the executors merely a power in trust to sell.

Obviously, the testator intended that the balance of the residuary estate should be divided among his children as soon as practicable. This was his purpose and his intent. The testator did not *intend* to create any trusts of the residuary real estate, and on this question the testator's intent is the determining factor. *Green* v. *Green*, 23 Wall. 486, 490 (1874).

If our contention that the will did not create a trust with respect to the remaining residuary estate is correct, then the real estate, of course, descended immediately to the children on the death of the testator, *Brewster* v. *Gage*, 280

U. S. 327, and the loss sustained on the sale of the real estate was their loss and deductible by them from their income, and the questions raised by the petition of the Solicitor-General do not arise.

Even if a technical trust was created with respect to the remaining residuary estate, as the Circuit Court of Appeals held, we submit that such Court erred in refusing to hold that it was a trust with respect to which the beneficiaries were entitled to deduct from their own income losses sustained on the sale of the trust corpus. This was the holding of the District Court. The outstanding fact is that the five beneficiaries of the trust had every present and future interest in the trust property and its income. There were no remaindermen; no adverse interests; the children's ownership was complete and exclusive. They were entitled, not only to the current income, but to the corpus and to the proceeds of sales of the property as rapidly as practicable. By 1922 practically all of the original corpus had been distributed.

The case is radically different from that of a trust in which a beneficiary has only a life interest in the income. In such a case it may well be that the beneficiary is not concerned with a loss on the sale of trust assets, except in so far as such loss may be subsequently reflected in diminution of income. (Compare *Baltzell* v. *Mitchell*, 3 F. [2d] 428, certiorari denied 268 U. S. 690.) In the case of a trust, however, in which the beneficiaries are entitled, not only to the current income but to the corpus, and their possession of the corpus is postponed only for the purpose of converting the property into a distributable form, it is obvious that a loss of the corpus is in fact the loss of the beneficiaries.

Our contention that the children were entitled to deduct the losses on the sale of the property even though a trust was technically created, is sustained by the decision of the

Circuit Court of Appeals for the Second Circuit in *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837 (certiorari denied, 282 U. S. 897); by decisions of the Board of Tax Appeals in *Munger* v. *Commissioner*, 16 B. T. A. 168; *Francis, Guardian, et al.* v. *Commissioner*, 15 B. T. A. 1332; and by the decision of the Court of Appeals of New York in *People, ex rel. Field* v. *Gilchrist*, 240 N. Y. 301.

In any event, we submit, the Collector was not prejudiced by the decision of the Circuit Court of Appeals that the taxpayer was entitled to deduct a portion of the loss on the sale of the real estate in the residuary estate, determined by the proportion which the amount of the proceeds of the sale distributed in the taxable year bore to the total proceeds of the sale. Under Sections 219 (a) (4) and 219 (c) of the Revenue Act of 1921, if such trust property had been sold at a profit and part of the profit retained by the trustees and part distributed, the amount of the profit retained would be taxed to the trustees and the amount distributed would be taxed to the beneficiaries. *Appeal of Scripps*, 1 B. T. A. 491; *Barton* v. *Commissioner*, 5 B. T. A. 1008; *Appeal of Sprague*, 8 B. T. A. 173. Where the trust property is sold at a loss, it logically follows that the beneficiaries are entitled to deduct at least that part of the loss proportionate to the part of the proceeds distributed to them within the year. While, as contended above, we believe the entire loss was deductible by the children, we submit that the children were at least entitled to deduct the loss on the same basis that a profit would have been taxed to them.

It is therefore submitted that if a writ of certiorari is granted on the petition of the Solicitor General, a writ should likewise be granted on the cross-petition.

Respectfully submitted,

GEORGE E. CLEARY,
CLARK T. BROWN,
Attorneys for Petitioners (on Cross-Petition).